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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-455

RALPH NADER, *Petitioner,*

v.

ALLEGHENY AIRLINES, INC., *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

QUESTION PRESENTED

Whether the Court of Appeals deviated from well established principles of the doctrine of primary jurisdiction by conditioning petitioner's tort claim on a finding by the agency statutorily charged with regulating the allegedly tortious activities that those activities are not sanctioned by the regulatory scheme.

STATUTES INVOLVED

Sections 102, 404(b), 411 and 1002(e) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. §§ 1302, 1374(b), 1381, and 1482(e), provide:

Section 102. [49 U.S.C. § 1302.] In the exercise and performance of its powers and duties under this chapter, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue performance or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The promotion of safety in air commerce; and

(f) The promotion, encouragement, and development of civil aeronautics.

Section 404(b). [49 U.S.C. § 1374(b).] No air carrier or foreign air carrier shall make, give, or

cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Section 411. [49 U.S.C. § 1381.] The Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition.

Section 1002(e). [49 U.S.C. § 1482(e).] In exercising and performing its powers and duties with respect to the determination of rates for the carriage of persons or property, the Board shall take into consideration, among other factors—

(1) The effect of such rates upon the movement of traffic;

(2) The need in the public interest of adequate and efficient transportation of persons and property by air carriers at the lowest cost consistent with the furnishing of such service;

(3) Such standards respecting the character and quality of service to be rendered by

air carriers as may be prescribed by or pursuant to law;

(4) The inherent advantages of transportation by aircraft; and

(5) The need of each air carrier for revenue sufficient to enable such air carrier, under honest, economical, and efficient management, to provide adequate and efficient air carrier service.

STATEMENT OF THE CASE

A. The Facts

This action arises from petitioner Nader's failure to obtain a seat on Allegheny Airlines Flight 864 from Washington, D.C., to Hartford, Connecticut, on April 28, 1972. Nader arrived at the gate sometime after 10:05 a.m. for the 10:15 a.m. flight (JA 35-36) and learned that all of the seats were occupied by reservations-holding passengers. JA 77-79. Nader was denied boarding on the Allegheny flight because he arrived at the gate later than all of the other Washington passengers that the flight could accommodate. (*Id*).

Despite the fact that he held a ticket and a reservation, Nader could not be boarded on Allegheny's flight because the flight had been "oversold," a rare consequence of an industry-wide practice of "overbooking" designed to ameliorate the harmful effects of late cancellations and "no-shows"—reservations-holding passengers who do not appear at flight time (hereinafter collectively referred to as "no-shows"). JA 66-70, 170-223.

If airlines did not overbook—that is, accept more reservations for a flight than the flight's capacity—

all flights would depart partially empty because of no-shows. JA 66-70, 170-223. Accordingly, airlines, including Allegheny, continually make statistical studies of the pattern of no-shows for each flight and accept a number of reservations in excess of the flight's capacity based on the number of no-shows that computer analysis of the flight indicates will occur. JA 170-223.

The purpose of Allegheny's statistical analysis of no-shows, and its consequent overbooking, is to ensure that each of its flights will depart with as few empty seats as possible. JA 124. Despite close statistical studies of each flight, every one of which is analyzed periodically, many of Allegheny's fully-booked flights customarily depart with empty seats.

On rare occasions, if actual no-shows for a flight deviate widely from the statistical pattern, more ticket-holding passengers will arrive for a flight than the flight can accommodate. Consequently, some passengers who have come to the airport with tickets will be denied boarding on the flight. These passengers are called "oversales."

The Civil Aeronautics Board (hereinafter "CAB"), which regulates Allegheny and other airlines pursuant to the Federal Aviation Act of 1958 (JA 2, 8), has examined extensively the airline industry's overbooking practices in a series of proceedings over many years. Pet. App. A8-A14. The CAB has not deviated from the conclusion it reached in 1967 that the reservations practices of the airlines, including overbooking and the occasional consequent oversales, have, "on balance, worked reasonably well in the public interest * * *." JA 174.

The CAB, recognizing the necessity of overbooking, determined not to ban it but instead instituted a system of denied boarding compensation to make whole the relatively few passengers who become "oversales."

> [T]he present reservations system of the carriers is designed to provide maximum benefits for the traveling public and to reduce the carriers' reservations costs. However, these ends are achieved at a price of substantial inconvenience and hardship to those *relatively few passengers* who are oversold and denied boarding although holding confirmed reservations. * * *
>
> [W]e shall permit the above described reservations practices to continue without regulation on condition that the carriers file tariffs providing prompt, effective and adequate compensation to denied boarding passengers, as proposed herein. [JA 180, 182; emphasis added; footnote deleted.]

The risk to the airline-traveling public of becoming an "oversale" is very slight indeed. From 1969 through 1973, which includes the period of Nader's denied boarding, 99.94% of all reservations confirmed by the carriers in domestic air transportation were honored. *Emergency Reservations Practices Investigation*, Initial Decision (CAB Docket 26253, June 10, 1974) (hereinafter "Initial Decision") at 29. The remaining .06% included reservations dishonored for a variety of reasons, such as substitution of equipment and government requisition, and not oversales alone. In the most recent three-year period for which statistics are available, Allegheny has performed better than the industry average in its number of denied boardings for all reasons, including oversales. The figures below are the number of denied boardings per 10,000 passengers enplaning.

	Industry	Allegheny
1972	5.4	6.3
1973	4.6	4.5
1974	5.8	4.6 [1]

In the same proceeding in which the CAB instituted denied boarding compensation, it *considered and rejected* a proposed rule that would have required airlines to advise passengers that they could become "oversales" on overbooked flights. The CAB agreed with the carriers that such disclosure would be contrary to the public interest in that it would, among other things, (1) create anxiety and confusion on the part of the traveling public, (2) cause travelers to make a great number of duplicative and protective reservations, (3) produce a rapid turnover of reservations within 24 hours before the departure of a flight, and (4) increase the no-show problem. Pet. App. A10; JA 173-174.

After Nader was denied boarding on April 28, 1972, Allegheny offered him, pursuant to CAB regulations, denied boarding compensation in the amount of $32.41 and alternate air transportation to Hartford scheduled to arrive 55 minutes after the flight on which he could not be accommodated. JA 169, 79-81. Nader declined both offers and chose instead to bring suit.

B. The Decisions Below

Nader's intent in asserting his claim against Allegheny was not to be made whole for any tortious injury that might have occurred to him, but rather

[1] Pet. App. A7; CAB, Bureau of Operating Rights, "Passengers Denied Confirmed Space, Calendar Years 1974 and 1973," at App. A and App. B (March, 1975).

to force Allegheny to cease its practice of overbooking flights. Nader's lawyer wrote to Allegheny before suit was filed to this effect as follows:

* * *

> Recent CAB statistics reveal that the airline industry is apparently unwilling to take the steps necessary to eliminate the oversales of their flights, a problem which has plagued consumers for many years and which remains a matter of serious public concern.[2]
>
> If you are interested in discussing the settlement of this matter before the complaint is filed, please let me knew before June 23, 1972. We anticipate that any such settlement would include an assurance on Allegheny's part that it would take immediate steps to eliminate overbooking and oversales. [JA 169.]

When settlement on these terms was not accomplished, Nader brought suit against Allegheny in the United States District Court for the District of Columbia seeking, together with a co-plaintiff, $250,000 in compensatory and punitive damages. JA 6-7. An award of that amount, or of any lesser but nevertheless substantial amount, would be tantamount to achieving Nader's objective of an injunction against overbooking. Allegheny, or any other airline, could not afford to pay such an amount to each oversold passenger.

---

[2] Nader, the nation's premier consumer advocate, claims that he was totally unaware prior to April 28, 1972, of airlines' overbooking (Brief for Pet. at 6-9), despite his lawyer's statement a month and a half later that airline oversales were "a problem which has plagued consumers for many years" (JA 169) and despite the fact that Nader had been denied passage on flights on two prior occasions by other airlines. Brief for Pet. at 6.

Nader and his co-plaintiff, Connecticut Citizen Action Group (hereinafter "CCAG"), a consumer group for whom he was scheduled to speak on the day of his abortive flight, claimed in their complaint that Allegheny was liable to them under the antidiscrimination provision of the Federal Aviation Act of 1958, 49 U.S.C. § 1374(b) (1970), and under common law tort principles of misrepresentation, for failing to disclose Allegheny's overbooking practices.

After a trial to the court, Judge Charles Richey entered a judgment for Nader on both the antidiscrimination and misrepresentation claims and awarded him $10 in compensatory damages and $25,000 in punitive damages. The Court also entered a judgment for CCAG on its misrepresentation claim and awarded it $51 compensatory damages and $25,000 in punitive damages. Pet. App. B10-B11.

On review by the United States Court of Appeals for the District of Columbia Circuit, in which Allegheny was supported by amicus briefs of the CAB and the Air Transport Association of America, that court reversed the District Court and remanded the case for further proceedings.

With respect to the District Court's judgment for Nader on the antidiscrimination claim, the Court of Appeals held that the lower court made errors of law and clearly erroneous findings of fact, and it remanded that portion of the case with directions to make new findings of fact and conclusions of law and to reopen the record if necessary. Pet. App. A14-A24, A49-A50. Because the Court of Appeals found no record evidence of malice or wanton conduct on behalf of Allegheny, and because it found that it was improper to

use punitive damages to deter other members of a regulated industry from conduct within the ambit of regulation, the court held that no punitive damages could be awarded as a matter of law on Nader's misrepresentation claim. *Id.* at A49-A50. Review is not sought here by Nader of these portions of the Court of Appeals' judgment.

The Court of Appeals further held that co-plaintiff CCAG could not recover from Allegheny on its claim of misrepresentation because it was not within the class of persons whom Allegheny had reason to expect might act in reliance on its statements, and the court reversed the judgment for CCAG. Pet. App. A40. That portion of the Court of Appeals' decision is likewise not before the Court.

With respect to the judgment for Nader on his claim of fraudulent misrepresentation, the Court of Appeals reversed as clearly erroneous the District Court's finding that Allegheny affirmatively misrepresented to Nader that he had a guaranteed reservation for a seat. Pet. App. A26. This ruling is not here on appeal. The court held that Nader had not proved Allegheny liable to him for the tort of misrepresentation. Rather, the court found that Nader's claim, if any, was for nonrepresentation—*i.e.*, for allegedly not disclosing that there was a risk of being an oversale on an overbooked flight. Pet. App. A25-A26. The court held that before the District Court could consider that claim, it must, pursuant to "an application of the principles of primary jurisdiction," stay its proceedings until the CAB had spoken, in a proceeding that the CAB is currently conducting, on the issue of whether Allegheny's alleged nondisclosure of its overbooking practices was "deceptive" or "unfair" within

the provisions of § 411 of the Federal Aviation Act, 49 U.S.C. § 1381 (1970). Pet. App. A32, A37. The court further held that the CAB's mandate to effectively regulate the airline industry in the public interest (pursuant, *inter alia*, to 49 U.S.C. §§ 1302 and 1482(e) (1970)) requires that if the agency finds Allegheny's overbooking practices not to be deceptive or unfair, then those practices as a matter of law cannot constitute common law misrepresentation. Pet. App. A30.

If, however, the CAB finds Allegheny's practices to have been deceptive or unfair and not part of the approved regulatory scheme, the Court of Appeals directed the District Court to determine whether Nader could recover for Allegheny's alleged nonrepresentation. Pet. App. A26, A31 n.40. The Court of Appeals ruled that in any further proceedings, Allegheny should not be held to a standard of full disclosure as a fiduciary, as the District Court had erroneously decided. Pet. App. A49. The District Court was also directed to consider, in determining the issue of punitive damages in the event Nader was permitted to recover on his tort claim, whether Allegheny had a good faith defense by its reasonable belief at the time of the occurrence that its overbooking policies were lawful and approved by the CAB. Pet. App. A48-A49.

Senior Judge Fahy concurred in those portions of the Court of Appeals' opinion which remanded Nader's antidiscrimination claim, which held that no punitive damages could be awarded on that claim, and which held that CCAG was not within the class of persons who could recover from Allegheny for the tort of fraudulent misrepresentation. Judge Fahy dissented from the majority's application of the doctrine

of primary jurisdiction to Nader's fraudulent misrepresentation claim. He argued that the claim was "ripe for review" by the Court of Appeals without recourse to the CAB and that a CAB finding that Allegheny's reservations and overbooking practices were not deceptive was no bar to Nader's possible recovery on that claim. Pet. App. A50-A60.

Thus, in light of the portions of the Court of Appeals' opinion not here on appeal, the most Nader can recover on his antidiscrimination claim on remand is $10 compensatory damages. If the fraudulent misrepresentation claim is retried, it is unlikely that Nader could recover punitive damages in view of Allegheny's defense, which the Court of Appeals was clearly correct in allowing (Pet. App. A48-A49), that Allegheny "reasonably believed that its policies were completely lawful and in fact carried the approval of the Board." See Argument I, *infra*.

C. The Remaining Proceedings

As the preceding discussion demonstrates, there are proceedings remaining in this case both at the trial and administrative levels.

The District Court on remand was directed by the Court of Appeals to resolve three factual issues, by reopening the trial record if necessary, on Nader's claim on the antidiscrimination provision of the Federal Aviation Act. The District Court was asked to resolve: whether Allegheny's own operations manual properly established denied boarding priority rules, as it is required to do by CAB regulations; what those rules were and whether they were properly interpreted by Allegheny's agent; and whether the agent's testimony was credible in light of certain documen-

tary evidence. Pet. App. A24. The resolution of these issues, while nominally directed to the antidiscrimination claim, might bear as well on a rehearing of the fraudulent misrepresentation claim, if one is held. Particularly, findings on the issues would go to whether Allegheny intended to deceive Nader or knew that its conduct was materially misleading, two elements of the tort of fraudulent misrepresentation. Brief for Pet. at 14 n.11; *Sankin* v. *5410 Connecticut Avenue Corp.*, 281 F. Supp. 524, 545 (D.D.C. 1968), *aff'd sub nom., Benn* v. *Sankin*, 410 F.2d 1060 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 1041 (1970); RESTATEMENT OF TORTS § 529 (1938). Further, resolution of the remanded issues might also affect Allegheny's defense to the imposition of punitive damages on the misrepresentation claim that the District Court was directed to consider, *i.e.*, whether Allegheny reasonably believed that its overbooking practices had been approved by the CAB. Pet. App. A48-A49.

There are also further proceedings on the administrative level. The Court of Appeals, in an "application of the principles of primary jurisdiction" (Pet. App. A32), directed the District Court to defer further consideration of Nader's misrepresentation claim until the CAB had spoken on the issue of whether Allegheny's failure affirmatively to disclose its overbooking practices was deceptive or unfair. Pet. App. A50. After noting that the CAB in 1967 had ruled that airlines *need not disclose* the overbooked condition of their flights to prospective passengers (Pet. App. A10), the court found that the CAB was again considering the fairness and reasonableness of airlines' overbooking practices, that an administrative

law judge had initially found the overbooking practices not to be deceptive, and that this decision was on review by the full CAB. Pet. App. A33-A37.

As a consequence of the Court of Appeals' decision, the CAB announced on July 11, 1975, in Order 75-7-54, that it was soliciting comments on how best to determine whether air carriers' information policies with respect to their overbooking practices have been unfair or deceptive. *Emergency Reservations Practices Investigation,* Order No. 75-7-54, 40 Fed. Reg. 30150 (1975).

If the CAB determines that Allegheny's overbooking practices are deceptive and not part of the approved regulatory scheme, then, pursuant to the Court of Appeals' decision (Pet. App. A31), Nader's claimed tort of fraudulent misrepresentation will be tried before the District Court, and the question presented by the instant writ—the immunization of a common law tort by a regulatory agency—will be moot.

SUMMARY OF ARGUMENT

The extremely narrow issue presented by petitioner is whether the particular facts of this case present one of the "specific instances" conceded by him to warrant the subordination of a common law claim to regulation by the CAB. In Part I, we demonstrate that petitioner has confused "oversales," which neither Allegheny nor any other airline engages in intentionally, with "overbooking," which the airlines do engage in and which the CAB has said works to the public's benefit. Overbooking is designed to prevent flights from departing with empty seats because of people who make reservations but then fail to appear

for those flights. This overbooking is carefully and statistically monitored for each flight so as to *prevent* oversales. The CAB not only has found overbooking advantageous to both carriers and prospective passengers but has designed an elaborate scheme of rules and criteria for dealing with it and with the rare oversale that may result from it. Thus, carriers must report oversales, provide boarding compensation for "bumped" passengers, establish priorities for those denied boarding, etc. Even more significantly, the CAB has considered and *rejected* a proposal that passengers be informed in advance of their flights that they could become oversales, pointing out, among other things, the terrible anxiety and confusion on behalf of passengers that would result. Thus, the CAB has investigated and regulated—and continues to do so in a current investigation—the very conduct for which petitioner seeks damages in the courts.

In Part II, respondent shows that this is precisely the kind of case where the issue (the deceptiveness and validity of respondent's overbooking practies) should be decided *vel non* by the agency which regulates those practices. The CAB has the expertise to balance all the competing interests in this difficult field. This is particularly important where rates are affected, as the CAB has noted is true in this case. The necessity for uniformity is demonstrated by the kind of situation which would result if some airlines were forced by court rulings or jury awards to disclose overbookings while others were silent on the subject.

In Part III, we demonstrate that the doctrine of exclusive primary jurisdiction is properly applied here where the courts would merely be deferring the question of respondent's overbooking practices to the

CAB for sanction or disapproval. If the CAB sanctions such practices, it would violate every concept of the primary jurisdiction doctrine, and would completely disrupt this regulated industry, to allow passengers to recover substantial awards in court based on the very practices that have been sanctioned by the regulatory agency. The two-fold answer to petitioner's argument that the CAB cannot retroactively declare practices legal and valid is that (a) the CAB, when it rules here in the exercise of its primary jurisdiction, will merely be declaring what its policy has been all along, and (b) even if this turns out not to be the case, the doctrine of primary jurisdiction fully allows an agency to declare practices legal and valid retroactively, and they have frequently done so with court approval.

ARGUMENT

I. THE CAB, AFTER SCRUTINIZING AIRLINE OVERBOOKING, HAS PERMITTED THAT PRACTICE AND HAS FOUND THAT DISCLOSURE OF THE PRACTICE IS NOT IN THE PUBLIC INTEREST.

The question presented by petitioner is extremely narrow. He does not contend that the Federal Aviation Act in all instances saves common law remedies. He merely argues that the accepted doctrine of primary jurisdiction does not apply to the specific facts of this case. His Brief states:

> Petitioner does not dispute the general proposition that in some specific instances the overriding purpose and operation of a federal regulatory statute will be so inconsistent with the continuing vitality of a common law remedy that the remedy cannot survive, notwithstanding a provision such as section 1106 [the common law rights savings clause]; his position is simply that the facts of this case do not place it within the narrow group of cases to which that proposition applies. [Brief for Pet. at 40.]

Thus, the penumbral issues of the case and most of the issues that were before the trial court have disappeared. This is no longer a case of whether a nonpassenger third party—CCAG—can recover for the noncarriage of Nader. This is not a case of whether Nader can recover under the antidiscrimination provision of the Act or whether he can collect punitive damages. Nor is this a case of whether overbooking is legal or whether the CAB has the authority to regulate overbooking. The only question before the Court is whether the facts of this case present one of the "specific instances" conceded by Nader to warrant the subordination of a common law claim to the regulatory scheme.

The tenor of Part I of petitioner's Argument is that the CAB has never sanctioned airlines' overbooking practices. This is not so. The CAB has explicitly stated that overbooking is a necessity in light of the no-show problem and that the combination of controlled overbooking and tariff-directed compensation to the rarely oversold passenger is the optimum and fairest method of dealing with the problem.

Petitioner's misapprehension of what the CAB has done may be explained by his continued confusion of the terms "overbook" and "oversale." An understanding of these terms is crucial; while airlines engage in controlled and planned overbooking, they do not deliberately oversell any flights. Oversales are in-

advertent statistical aberrations that occur in the actuarial system of overbooking.

This confusion in terminology was even evident at the trial, as this exchange with Allegheny's expert witness demonstrates:

> The Witness: * * * You used the word "overselling" and not "overbooking". I assume you are using that distinction intentionally.
>
> By Mr. Robertson [Nader's counsel]:
>
> Q. I am not aware of a distinction.
>
> A. Well, an overbooking relates to the practice in the reservation system of placing—of accepting more reservations that you have seats in inventory. But if the system works at all, there are very few, if any, oversales. [JA 66.]

The confusion persists. In discussing a 1962 CAB order dealing with denied boarding compensation, petitioner's Brief states as follows:

> The approval order, however, made clear that the Board was not sanctioning *overbooking*:
>
> > The Board's action in making provision for payment to *oversold* passengers should not be construed as an indication that the Board condones *deliberate oversales* on the part of the air carriers. On the contrary, the proposed plan is designed to provide a measure of relief for passengers who are the victims of inadvertencies. Instances of *intentional oversales* will be fully investigated. [Brief for Pet. at 28-29; emphasis added.]

Obviously, the Board's language relied on by Nader to support his proposition that the Board has not sanctioned overbooking does no such thing. The Board

is saying that deliberate and intentional *oversales* cannot be condoned. Allegheny takes no issue with this statement because it never intentionally oversells any of its flights. Furthermore, the statement has nothing to do with this case. Nader has at no time claimed, and there is no evidence to support the claim, that he was an intentional or deliberate oversale. He was the victim of a statistical aberration and nothing more.

With this confusion out of the way, the CAB's policy with respect to overbooking is clear. This position is well summarized in a 1973 CAB notice:

> In the original rulemaking promulgating Part 250 (EDR-109, dated Jan. 10, 1967 and ER-503, adopted Aug. 3, 1967) the Board found that a certain degree of overbooking was inherent in the air carriers' reservations systems, but that such controlled overbooking usually worked to the advantage of both the air carrier and its prospective passengers. However, while we felt that these reservations systems have, "on balance, worked reasonably well in the public interest," we also concluded that the public interest required those passengers who were denied boarding because of oversales be reasonably compensated for the distress, inconvenience and damage which they suffered as a result of such denied boarding. [*Notice of Proposed Rulemaking,* EDR 248 at 5, 38 Fed. Reg. 15083 (1973).]

The CAB's regulation of what it perceives to be the adverse consequence of overbooking has been pervasive and detailed. Its regulations are the result of continued scrutiny over many years of the carriers' reservations and overbooking practices, as Nader's partial recitation at pages 24 through 36 of his Brief demonstrates. The regulations, which have remained

unchanged from the time of Nader's denied boarding, include the following:

—"Each carrier shall establish priority rules and criteria for determining which passengers holding confirmed reserved space shall be denied boarding *on an oversold flight*". These rules are to be filed with the CAB, where they are publicly available.[3] 14 C.F.R. § 250.3; emphasis added.

—Each carrier shall file a tariff providing for denied boarding compensation to passengers who are "bumped" under certain circumstances. 14 C.F.R. § 250.4.

—Each carrier shall tender to the passenger eligible for denied boarding compensation a draft of his denied boarding compensation "on the day and place the denied boarding occurs". 14 C.F.R. § 250.8.

—Each carrier shall provide to passengers who are denied boarding a written explanation of their rights and how to exercise them. 14 C.F.R. § 250.9. The text of this statement is dictated by the CAB and is set forth in the footnote below.[4]

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[3] Nader concedes that the CAB would have primary jurisdiction to consider the legality of any practice for which the public has "constructive notice", such as by way of filed tariffs. Brief for Pet. at 42 n.26. Since the public filing with the CAB of airline rules directed to oversales is the functional equivalent of tariffs as far as notice is concerned, Nader appears to have conceded that the CAB has primary jurisdiction to hear his fraudulent misrepresentation claim.

[4] "Tariffs filed by this carrier with the Civil Aeronautics Board provide denied boarding compensation to a passenger holding confirmed reserved space where the flight for which the passenger holds such space is unable to accommodate him and departs without him.

"Passengers eligible for denied boarding compensation shall be

—Each carrier shall file monthly and quarterly reports with the CAB itemizing and describing the circumstances of the passengers who were

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compensated at the rate of 100 percent of the value of the first remaining flight coupon on their tickets with a $200 maximum and a $25 minimum. The carrier is required to tender to each such passenger, on the day and place the denied boarding occurs, a draft in the amount specified above which, if endorsed and paid within 30 days, shall relieve the carrier from liability for all claims for damages which might accrue to the passenger as a result of the carrier's failure to provide the passenger with space on the flight in question. Where, however, the carrier arranges, for the passenger's convenience, alternate means of transportation which departs before the draft can be prepared and tendered the passenger, tender will be made by mail or other means within 24 hours after the time the denied boarding occurs.

"In order to qualify for such compensation a passenger must have complied fully with the carrier's requirements as to ticketing, check-in and reconfirmation procedures and be acceptable for transportation under the carrier's tariff. However, a passenger is not eligible for compensation if (a) the flight for which the passenger holds confirmed reserved space is unable to accommodate him because of Government requisition of space or substitution of equipment of lesser capacity for operational and/or safety reasons; (b) the carrier arranges for comparable air transportation [6] or for other transportation accepted (i.e., used) by the passenger, which, at the time either such arrangement is made, is planned to arrive at the airport [7] of the passenger's next stopover or, if none, at the airport [8] of his destination earlier than, or not later than

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[6] 'Comparable air transportation' means transportation provided by air carriers or foreign air carriers holding certificates of public convenience and necessity or foreign permits issued by the Board.

[7] 'Airport' means the airport at which the direct or connecting flight, on which the passenger holds confirmed reserved space, is planned to arrive or some other airport serving the same metropolitan area that is served by the former: *Provided*, That transportation to the other airport is accepted (i.e., used) by the passenger.

[8] Ibid.

denied boarding for the reporting period. 14 C.F.R. § 250.10.

Thus, the CAB regulatory scheme clearly contemplates overbooking and the consequent rare oversale. In 1973, the CAB Office of Consumer Affairs published a booklet for air passengers, available upon request, confirming that oversales occurred in the regulated airline industry and that the remedy for the oversales was denied boarding compensation:

> The CAB's regulations require most certificated carriers to offer compensation to passengers holding confirmed reservations for a particular flight who have been denied boarding *because that flight has been oversold.* * * * [I]n short, if you get bumped, under certain conditions specified by CAB, you are entitled to a payment from the airline equal to the cost of your next flight coupon. This penalty payment is in addition to the transportation already purchased. [CAB, Air Travelers' Fly-Rights (unpaginated) (1973); emphasis added.]

The industry's overbooking and denied boarding practices were most recently scrutinized in the Emergency Reservations Practices Investigation described by the Court of Appeals. Pet. App. A33-A37. The Initial Decision of the administrative law judge noted

2 hours after, the time the direct or connecting flight, on which confirmed reserve space is held, is planned to arrive in the case of interstate and overseas air transportation, or 4 hours after such time in the case of foreign air transportation; or (c) the passenger is accommodated on the flight for which he holds confirmed reserved space, but is offered accommodations or is seated in a section of the aircraft other than that specified in his ticket at no extra charge: *Provided,* That a passenger seated in a section for which a lower fare is charged shall be entitled to an appropriate refund." [14 C.F.R. § 250.9.]

that oversales had actually decreased as a percentage of enplanements in recent years. Pet. App. A36. The judge found, despite arguments submitted to him by a consumer group that he should rule airline overbooking illegal, that "The present rules, regulations, and practices of domestic certificated scheduled air carriers pertaining to ticketing, reservations (including reconfirmation), and denied boarding compensation, in interstate transportation * * * are not unjust or unreasonable, unjustly discriminatory, unduly preferential, unduly prejudicial, or otherwise unlawful." Pet. App. A36, quoting Initial Decision, *supra*, at 29.[5]

The most significant aspect of the CAB's decisions in the overbooking-oversale area with respect to Nader's claim of fraudulent misrepresentation, how-

[5] The same judge noted in his opinion that "All carriers * * * engage in deliberate overbooking—or planned capacity management as it is referred to by some—to help offset the effects of the no-show, late cancellations, and the like." Initial Decision, *supra*, at 10. And he added in a footnote:

> Some parties contend that the airline practice of overbooking is somehow a justification for the tripling [of compensation for "bumped" passengers] proposal. However, it is clear from the record that, as the Board has previously recognized, deliberate overbooking is neither inherently evil nor necessarily adverse to the interests of the traveler. EDR-109, January 10, 1967. It does result in some oversales, the incidence of which has not been shown, and the carriers should continually seek to reduce the necessity for the practice. However, overbooking does produce positive benefits by expanding the passenger's opportunity to obtain the flight of his choice, adding flexibility to the reservations systems for securing, changing and canceling reservations, maximizing load factors and reducing the pressure for fare increases. Overbooking is likely to continue as a capacity management practice regardless of the level of denied boarding compensation and to be affected much more directly by other elements of the no-show control plan. [*Id.* at 52 n. 35.]

ever, was its ruling in 1967 that requiring airlines to give notice to passengers of the overbooked condition of flights was *not* in the public interest. In its *Notice of Proposed Rule Making,* EDR 95 at 4, 30 Fed. Reg. 13236 (1965), the Board proposed a rule requiring carriers to give notice 12 hours in advance of flight time to all passengers on an overbooked flight "to be helpful to passengers who may attempt to make alternative or contingent travel arrangements." In its next proposed rulemaking on overbooking, EDR 109, 32 Fed. Reg. 459 (1967), the Board reconsidered the proposed disclosure rule and decided that such a rule would not be in the public interest. Its decision was based in part on the credence that it gave to the airline industry's comments on the proposed notice rule that:

> [T]he proposed notification rule (1) would be largely unworkable; (2) would create anxiety and confusion on the part of the traveling public, severely weakening public confidence in air carrier reservations systems; (3) would increase unnecessarily, and at an undue cost to the industry, the already-heavy workload which must be handled within extremely narrow tolerances by airline reservations systems; (4) would cause the public to make a great number of duplicative and protective reservations; (5) would increase the already rapid turnover of reservations within the last 12-24 hours before departure; and (5) [sic] would increase the troublesome "no-show" and late cancellation problems. [JA 173-174.]

The Board further noted that disclosure of an overbooked condition, because of the response that it would likely induce in reservations-holding passengers, would be tantamount to banning overbooking, which the

Board did not wish to do. The Board found overbooking to be a benefit to the traveling public:

> It is also apparent that the notice requirement of EDR-95 would not only have the effect of controlling the practice of deliberate overbooking. The effect of the notice would be to seriously curtail the practice. Thus, carriers would not overbook if they were required to advise passengers of their overbooked status twelve hours prior to flight time in view of the resultant confusion, alarm, bitterness and cancellation of reservations. * * * Had the requirement proposed in EDR-95 been in effect, it is manifest that a very sizeable number of persons would have been needlessly alarmed by the notification of their overbooked status and that reservations would have been canceled on flights which actually could have accommodated these passengers. Further, were the carrier prevented from overbooking, large numbers of passengers would be denied reservations on flights which, because of reservations turnover and "no-shows," would depart with empty seats.
>
> In our view, any realistic appraisal of the practice of overbooking leads to the conclusion that, while it results in oversales, it also contributes to flexibility and freedom in securing, changing and cancelling reservations. Thus, any rigid controls over overbooking, as now practiced, would inevitably lead to restrictions on privileges which contribute greatly to the convenience of air transportation, and have come to be relied upon by the traveling public. In addition such controls would reduce load factors, and the additional cost would ultimately have to be borne by the traveling public.
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> In light of the above, it can be seen that the present reservations systems of the carriers in general benefit the traveling public. [JA 176-177.]

Among the statutory authorities cited by the CAB for its actions in EDR-109—including its ruling that disclosure of overbooking was not in the public interest—was § 411 of the Act. JA 170. *See also* JA 197.

Accordingly, petitioner's statement that "* * * the CAB has never ruled that any airline's overbooking or related practices are not deceptive, or otherwise should be approved" (Brief for Pet. at 18) is true only to the limited extent that the CAB has never made airline-by-airline rulings. The Board's 1967 action, however, indisputably approves the airline industry's overbooking practies, including the industry's policy of nondisclosure.

II. THE DOCTRINE OF PRIMARY JURISDICTION COMPELS REFERENCE TO THE CAB OF THE DECEPTIVENESS VEL NON AND LEGITIMACY OF ALLEGHENY'S OVERBOOKING PRACTICES.

The Court of Appeals ruled that Nader's fraudulent misrepresentation claim should be deferred until the CAB had spoken on whether Allegheny's overbooking practices were deceptive or nevertheless legitimate within § 411 of the Act. If the CAB finds that those practices were not deceptive, then the practices cannot as a matter of law constitute common law misrepresentations. Pet. App. A30. This result was "but another application of the principles of primary jurisdiction, a doctrine whose purpose is the coordination of the workings of agency and court." Pet. App. A32.

The court's application of the doctrine of primary jurisdiction was proper. The doctrine has been fashioned so that those regulated by government agencies will not be subject to conflicting and contradictory directions from court and agency:

> Whether the agency happens to be expert or not, a court should not act upon subject matter that is peculiarly within the agency's specialized field without taking into account what the agency has to offer, for otherwise parties who are subject to the agency's continuous regulation may become the victims of uncoordinated and conflicting requirements. [3 K. Davis, *Administrative Law Treatise* § 19.01 at 5 (1958).]

Accord, Carnation Co. v. *Pacific Westbound Conference,* 383 U.S. 213, 221, *modified on other grounds,* 383 U.S. 932 (1966). This rationale was recognized by the Court of Appeals. Pet. App. A32.

A subsidiary rationale of the doctrine is that the expertise of regulatory agencies should be made available to each court, "thereby aid[ing] the court by laying a foundation for a more intelligent disposition of the question * * *." *Weidberg* v. *American Airlines, Inc.,* 336 F. Supp. 407, 409 (N.D. Ill. 1972). *Accord, Ricci* v. *Chicago Mercantile Exchange,* 409 U.S. 289, 305-306 (1973). This rationale was also recognized by the Court of Appeals. Pet. App. A32.

Thus, considering the rationale of the doctrine, it is not necessary that the regulatory agency have actually engaged in regulation of the practice or matter referred to it by the court, as long as the matter referred is within the agency's power to regulate—"within the sphere of regulation of the administrative agency" (*Adler* v. *Chicago & Southern Air Lines, Inc.,* 41 F. Supp. 366, 367 (E.D. Mo. 1941))—and involves the agency's specialized field. Here, as Part I of the Argument has shown, the CAB has been continually active in the area of overbooking and oversales, but such activity need not be a prerequisite to the invocation of primary jurisdiction.

Furthermore, the doctrine is particularly appropriate when the matter under consideration involves or has an effect on the rates of a regulated industry. Indeed, it was a common law challenge to a railroad rate that generated the seminal primary jurisdiction case, *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), in which this Court held that the reasonableness of regulated railroad rates must be decided by the Interstate Commerce Commission and not by the courts.

> For if, without previous action by the Commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that unless all courts reached an identical conclusion a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question. Indeed the recognition of such a right is wholly inconsistent with the administrative power conferred upon the Commission and with the duty, which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed. [*Id.* at 440-441.]

It is not only a direct challenge to a rate that invokes the primary jurisdiction doctrine; a challenge to any practice affecting rates must fall within the doctrine. The doctrine applies "to any practice of the carrier which gives rise to the application of rate." *Northern Pacific Ry.* v. *Solum*, 247 U.S. 477, 483 (1918) (Brandeis, J.). For example, in *Southwestern Sugar & Molasses Co.* v. *River Terminals Corp.*, 360

U.S. 411 (1959), the issue was whether a provision in a duly filed transportation tariff which purported to release the carrier from liability for its own negligence was a complete defense to a libel for negligence. Since the rate specified in the tariff was computed on the understanding that the exculpatory clause would relieve the carrier of the insurance expenses against liability for negligence, this Court held that the issue was sufficiently related to rates to fall within the primary jurisdiction of the ICC. *Id.* at 421.

Similarly, in *Vogelsang* v. *Delta Airlines, Inc.*, 302 F.2d 709 (2d Cir.), *cert. denied*, 371 U.S. 826 (1962), where the carrier cited a liability limiting provision filed with its tariff as a defense to a claim for conversion or misdelivery of baggage, the court construed the claim as an attack on the reasonableness of the liability limitation and affirmed the judgment for the defendant on this defense on the grounds that the CAB had approved the liability limitation, which was within its primary jurisdiction. *Id.* at 713.

With this understanding of the doctrine of primary jurisdiction, the correctness of the invocation of the doctrine by the Court of Appeals in the instant case cannot be questioned. Applying the uniformity rationale first, it is obvious that uniformity of the regulation of airlines' overbooking disclosure practices must obtain. The consequences to the airline industry would be disastrous if some airlines, through court rulings and punitive damages awards, were forced to disclose the overbooked conditions of flights and the resultant risk of oversales, while their competitors remained silent. As the CAB has noted, the disclosing airlines would suffer an immense competitive disadvantage. Passengers would seek transportation to their destina-

tions on the non-disclosing airlines rather than the disclosing airlines. Passengers would make multiple reservations, thus exacerbating the no-show problem. Or, passengers would simply seek non-air transportation, to their disadvantage as well as to the airlines'.

While the regulatory scheme permits some controlled experimentation in reservations procedures, as Nader points out (Brief for Pet. at 42-44), such deviations from a uniform scheme are carefully controlled by the Board through its administrative procedures. That the Board permits such experimentation does not alter the fact that court-imposed deviations from the regulatory scheme would be destructive of that scheme.

Petitioner's statement that airline overbooking practices are not "an area where uniformity is essential" (Brief for Pet. at 42) is absurd. The Court of Appeals found that the overbooking disclosure problem was "as wide as the industry itself [and] a single, industry-wide resolution is appropriate." Pet. App. A32. By adopting the regulatory scheme it has in this area, the CAB has implictly recognized that uniformity is essential. Moreover, it has specifically said so. "The no-show problem is essentially an industry problem, and it would be most desirable in our opinion that it be dealt with on a uniform basis." *Conditional Reservation Rule Proposed by Eastern Air Lines, Inc.*, Order No. 71-6-120 at 3 (1971). In a policy statement on whether the oral confirmation by carriers of reservations over the telephone was deceptive within § 411 of the Federal Aviation Act, the Board said, "Where substantial uniformity of practice is significant, as we deem it to be here, a statement of policy interpreting a general regulatory statute like section 411 is not only

justified but necessary." Regulation PS-58 at 4, 39 Fed. Reg. 38095 (1974).

In its amicus brief filed with the Court of Appeals the CAB urged the doctrine of primary jurisdiction because the practice challenged by petitioner's tort suit should be the subject of uniform regulation by the Board:

> [The District Court] departed from the salutary principle that carriers' practices should be regulated on a uniform basis and that the agency charged with their regulation should specify in the first instance what those practices should be. [Brief for Civil Aeronautics Board as Amicus Curiae at 15-16; footnote omitted.]

Similarly, the need for agency expertise in the area of airline overbooking and its disclosure is manifest. The CAB is charged by Congress with regulating the airline industry to serve, *inter alia*, "the public convenience and necessity", "the present and future needs of the foreign and domestic commerce of the United States", "the relations between * * * air carriers", "economical, and efficient service by air carriers at reasonable charges", "[c]ompetition to the extent necessary to assure the sound development of an air-transportation system", "safety" and "the need of each air carrier for revenue." 49 U.S.C. §§ 1302, 1482 (e). In carrying out its statutory responsibilities, the CAB has developed an expertise that enables it, far better than judges and juries, to pass on the merits of airline practices in the complicated area of reservations and overbooking.

The fact that this is a complicated area, requiring the most detailed knowledge and a balancing of inter-

ests, is reflected in the following statement by the CAB when it amended its oversales rules to make them applicable to foreign air carriers:

> These [oversales] rules, it must be remembered, stem from the Board's decision in its 1967 rule-making proceeding to refrain from banning outright the practice of intentional overbooking. Such a ban was and is well within the Board's authority in view of the undoubted harm which the practice does to those passengers who wind up being denied boarding despite their confirmed reservations, and the inherently deceptive and frequently discriminatory nature of the practice itself. The Board refrained from an outright ban only because of its concern for the adverse effect on carrier economics, and ultimately on passenger fares, of the seats left empty by cancellations and "no shows"—seats which the practice of intentional overbooking is designed to fill. But the Board considered that its abstention from an outright ban on the practice could only be justified if it prescribed an adequate, clearly defined, and readily available remedy to compensate those passengers who are harmed as a result of the practice, and only if it also required the carriers to adopt and abide by non-discriminatory boarding priority rules. If the Board lacks authority to prescribe these remedies, then the only alternative will be to outlaw intentional overbooking altogether.
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> * * *
>
> [T]he Board's action * * * is a procedural device for reflecting the remedy which the Board has prescribed in its regulation of intentional overbooking practices, which would otherwise be subject to a complete ban, as unlawful, whether practiced by foreign or U.S. air carriers. [Reg. ER-880 at 8-9, 39 Fed. Reg. 38087, August 13, 1974.]

Turning to the effect on rates of Allegheny's overbooking practices, the Court of Appeals found that "the practices at issue have a significant rate making effect." Pet. App. A30. The court was not mistaken. The effect on rates of overbooking has been previously recognized in the courts. *Archibald* v. *Pan American World Airways, Inc.*, 460 F.2d 14, 16 (9th Cir. 1972). The CAB itself informed the Court of Appeals of the effects on airline revenues, and thus on rates, of overbooking:

> In order to balance multiple bookings, cancellations and no-shows with available seats, air lines must overbook their flights. Otherwise, planes will depart with many, many empty seats, costing the air lines precious revenues and requiring them to turn away in advance passengers who ultimately could have been accommodated. [Brief for the Civil Aeronautics Board as Amicus Curiae at 23.]

More particularly, the CAB has found that *disclosure* of overbooking would have an impact on airline revenues, and thus on rates, as already noted. Clearly, airlines' overbooking practices and their disclosure *vel non* bear as directly on rates, if not more so, than the exculpatory clauses held to have a rate-making effect in *Southewestern Sugar & Molasses Co.* v. *River Terminals Corp., supra,* and *Vogelsang* v. *Delta Airlines, Inc., supra.*

In addition to the need for uniformity of regulation, agency expertise, and the effect on rate-making, there is another factor, unique to this case, compelling reference to the CAB. The District Court apparently fashioned from Allegheny's status as a regulated common carrier a duty on its part to disclose its practice

of overbooking, the breach of which would constitute the tort of fraudulent misrepresentation.

> * * * The Defendant Allegheny Airlines is a common carrier which is licensed or authorized to do business by the Civil Aeronautics Board, as hereinbefore stated, and is the holder of a certificate of public convenience and necessity. As such it has a *public duty* and an especially large and high fiduciary obligation to make its policies known to all of its customers with regard to its intentional over-booking.
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> * * *
>
> * * * CCAG is eligible and entitled to recover herein for damages it has incurred due to the Defendant's intentional misrepresentation even though they [sic] were not direct parties to the transaction in issue because: * * * CCAG was within the class of foreseeable plaintiffs (the class is determined by the Defendant's *legal duty to the public at large* both *under its license* and by its better position to prevent injury to the public by full disclosure of its practices affecting the public) * * *. [Pet. App. B6, B8; emphasis added.]

Clearly, the duties imposed by a certificate of public convenience and necessity from the CAB is for the CAB to determine, subject to judicial review, and not for the courts. The specter of judges and juries throughout the country imposing varying duties and obligations on certificated air carriers is frightening. Congress obviously sought to prevent such an outcome by its passage of the Federal Aviation Act, by which it determined that air carriers will be regulated by the CAB and not by the courts. This position was urged on the Court of Appeals by the CAB:

> This "public duty" found by the [district] court obviously derives not from the private obligations

> of the common law but from the public obligations imposed on air carriers by the Federal Aviation Act. *Cf. T.I.M.E. Inc.* v. *United States,* 359 U.S. 464 (1959). The regulatory pattern entrusts determinations of this nature to the Board alone for Congress intended that carriers' duties under the Act should be regulated by the Board on a uniform basis. *See Compania Nacional etc.,* 25 C.A.B. 141 (1957); *Viking Airliners, et al.,* 11 C.A.B. 401, 412 (1950); *Air America,* 18 C.A.B. 810, 814, 829-30 (1954); *cf. Ricci* v. *Chicago Mercantile Exchange,* 409 U.S. 289 (1973); *Danna* v. *Air France, supra,* 463 F.2d 407; *Hughes Tool Co.* v. *Trans World Airlines,* 409 U.S. 363 (1973); *Pan American World Airlines, Inc.* v. *United States,* 371 U.S. 296 (1963). [Brief of the Civil Aeronautics Board as Amicus Curiae at 34.]

As we have noted, the imposition of substantial punitive damages for the breaching of the "public duty" found by the District Court is tantamount to an injunction against overbooking. It has always been the law that courts lack the power in the first instance to enjoin as unreasonable those practices in a regulated industry which are subject to the cease and desist power of the appropriate agency. This rule has been specifically applied to injunctions and punitive damages awards in the area of airline overbooking. *Mortimer* v. *Delta Air Lines,* 302 F. Supp. 276 (N.D.Ill. 1969); *Wills* v. *Trans World Airlines, Inc.,* 200 F. Supp. 360 (S.D. Cal. 1961). Pet. App. A46-A47.

In addition to the general, and unpersuasive, argument that this is not a case for the application of the primary jurisdiction doctrine, petitioner makes various more specific arguments against primary jurisdiction, which are equally without merit. He argues that

reference of the question of the deceptiveness *vel non* of Allegheny's overbooking practices pursuant to § 411 of the Act would open the floodgates and force the CAB "to concern itself with all manner of trivial issues." Brief for Pet. at 38. If this is indeed the result of the Court of Appeals' decision, it does not appear to concern the CAB, which should be the most vigorous guardian of its jurisdiction and workload. The CAB argued to the Court of Appeals that the question of overbooking disclosure belonged before it pursuant to § 411:

> While we view the issue of culpability for overbooking and the non-disclosure thereof as properly falling within the ambit of Section 411, the point is academic in relation to the issue of whether the court erred in this case in independently evaluating Allegheny's practices. Plainly, Allegheny's practices are subject to Board regulation, and either the primary or exclusive jurisdiction principle is applicable to them irrespective of the statutory provision under which they may be catalogued. [Brief for the Civil Aeronautics Board as Amicus Curiae at 20; footnote omitted.]

Flooding the CAB with trivial issues, however, will not be the consequence of affirming the Court of Appeals' decision. Only lawsuits meeting the traditional tests of primary jurisdiction, as described above, would be referred to the CAB. Certainly, this test would bar "trivial" references. Moreover, the CAB will be its own judge of whether, and how extensively, it need consider the referenced matters. *See Ricci* v. *Chicago Mercantile Exchange, supra,* 409 U.S. at 304 n.14; *S.S.W., Inc.* v. *Air Transport Ass'n of America,* 191 F.2d 658, 663 (D.C. Cir. 1951), *cert. denied,* 343 U.S. 955 (1952).

Finally, petitioner suggests that the adjudication of private disputes under state law is not a matter within the primary jurisdiction of the CAB, and that the statutory powers of the agency "are to be exercised only as a means of vindicating the public interest * * *." Brief for Pet. at 49. He concludes:

> The courts of law, rather than the regulatory agencies charged with the protection of the overall public interest, are available for the resolution of private controversies involving air carriers. [*Id.* at 49-50; footnote omitted.]

The considerations of uniformity and consistency in the regulatory scheme, and of agency expertise, underlying the doctrine of primary jurisdiction point clearly to the non-existence of any asserted "private grievance" exception to the doctrine. It matters not that the courts are equipped by experience and tradition to adjudicate private common law claims if those claims raise issues whose resolution may affect the uniformity of regulation or may be aided by an agency determination.[6] For example, in *Southwestern Sugar & Molasses Co.* v. *River Terminals Corp., supra,* 360 U.S. 411, the issue was the effect to be given an exculpatory clause in a negligence case. Although the courts traditionally resolved such issues, this Court held that the issue was within the primary jurisdiction of the ICC.

> We may assume that the question whether a clause of this kind offends against public policies is one

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[6] Nor, for the same reason, does the propriety of invoking primary jurisdiction turn upon the particular nature of the relief plaintiff seeks. *Laveson* v. *Trans World Airlines,* 471 F.2d 76, 83 (3rd Cir. 1972). "Rather, it rests upon a judicial reluctance to hold practices within the scope of an agency's jurisdiction to be [unlawful] • • • before prior resort to the agency." *Id.* at 83-84.

> appropriate ultimately for judicial rather than administrative resolution. But that does not mean that the courts must therefore deny themselves the enlightenment which may be had from a consideration of the relevant economic and other facts which the administrative agency charged with regulation of the transaction here involved is peculiarly well equipped to marshal and initially to evaluate. [*Id.* at 420.]

Thus, petitioner's purported public/private grievance distinction is untenable, and has been consistently rejected by the courts. In *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U.S. 422, 432 (1940), "[t]he action was an ordinary one in assumpsit on a written contract" between private parties. Nevertheless, since it raised a question of the legality of the practices of one of the parties, which was subjected by the regulatory statute to the administrative authority of an agency, this Court invoked the doctrine of primary jurisdiction. *Thompson* v. *Texas Mexican Ry.*, 328 U.S. 134 (1946), was a state court action between private parties for breach of contract, in which the trial court awarded damages and was upheld on appeal in the state courts. This Court reversed, invoking the ICC's primary jurisdiction.

> These matters involve not only the interests of the two parties to the trackage agreement but phases of the public interest as well. A court which enforced the termination clause of the agreement pursuant to its terms would be narrowing the choice of the Commission and perhaps embarrassing it in the performance of the functions with which it has been entrusted. [*Id.* at 143-144.]

And in *American Airlines, Inc.* v. *North American Airlines, Inc.*, 351 U.S. 79, 83 (1956), this Court suggested

that the CAB's primary jurisdiction could be exercised in a "proceeding which may be generated from facts also giving rise to a private dispute * * *," evidently perceiving no mutual exclusivity between public and private disputes. Moreover, here Nader's purported distinction seems substantially undermined by the trial court's predication of the carrier's liability upon breach of an alleged "public duty."

III. IF THE CAB SANCTIONS ALLEGHENY'S OVERBOOKING PRACTICES, SUCH PRACTICES CANNOT CONSTITUTE A COMMON LAW TORT.

Petitioner argues that the facts of this case do not warrant the extinguishing of his common law tort claim, although he concedes that the law permits such an extinguishing in certain circumstances. Brief for Pet. at 40. He argues further that even assuming his common law tort could be taken away by the action of an agency, "the concept that it could do so *retroactively* * * * cannot be supported." *Id.* at 48. His contention rests primarily on the common law rights savings clause of the Act, 49 U.S.C. § 1506.

The doctrine of primary jurisdiction, which has been properly applied in this case, contemplates the subordination of common law claims when those claims are repugnant to the regulatory scheme. This is what Nader concedes. Professor Jaffe has explained that a court will not lose its jurisdiction over the common law cause of action, but must defer to the finding of the agency on the element, or issue, of the common law cause of action referred to the agency. In this case it is the deceptiveness *vel non* of Allegheny's actions—one element of the common law tort of fraudulent misrepresentation—that has been assigned to the agency, as well as the legitimacy of those actions if deceptiveness is somehow involved.

> Primary jurisdiction is *pro tanto* exclusive jurisdiction; insofar as the agency has jurisdiction it excludes the courts. But the court, though not competent to decide one of the issues, may still have jurisdiction over the cause of action to which decision of the issue is relevant, as in the case, for example, where the doctrine of collateral estoppel operates. The jurisdiction of the court will extend to the remaining issues and the relief to be granted.
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> * * * The primary jurisdiction of an agency may extend so far that it involves virtual judicial withdrawal. [Jaffe, "Primary Jurisdiction," 77 Harv. L. Rev. 1037, 1038-39 (1964).]

This view of exclusive primary jurisdiction was ratified by this Court in *United States* v. *Western Pacific Ry. Co.*, 352 U.S. 59 (1956), in which Mr. Justice Harlan described for the Court the doctrine of primary jurisdiction as follows:

> The doctrine of primary jurisdiction thus does "more than prescribe the mere procedural time table of the lawsuit. It is a doctrine allocating the law-making power over certain aspects" of commercial relations. "It transfers from court to agency the power to determine" some of the incidents of such relations. [*Id.* at 65, quoting Jaffe, "Primary Jurisdiction Reconsidered," 102 Univ. Pa.L.Rev. 577, 583-584 (1954); footnote omitted.]

Such a "transfer" contemplates a removal of the power over certain "commercial relations" from the courts, although courts still retain jurisdiction over the remaining elements of the cause of action. This view was first suggested in *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co., supra,* and has been followed in subsequent cases. Thus, *United States Nav. Co.* v. *Cunard S.S. Co.*, 284 U.S. 474 (1931), and *Far East Conf.* v. *United States,* 342 U.S. 570 (1952), have been construed by this Court as finding exclusive primary jurisdiction in an agency to make certain initial determinations. *Carnation Co.* v. *Pacific Westbound Conf., supra.*, 383 U.S. at 220. Nader has himself characterized *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co., supra*, and *Danna* v. *Air France*, 463 F.2d 407 (2d Cir. 1972), as cases "where an essential issue in the case (*e.g.*, the reasonableness of tariff rates) can *only* be decided by the agency." Pet. for Cert. at 19 n.22; emphasis added.

The operation of exclusive primary jurisdiction can also be seen in this Court's decision in *Port of Boston Marine Terminal Ass'n* v. *Rederiaktiebolaget Transatlantic,* 400 U.S. 62 (1970). Plaintiff sued defendant in state court for payment of certain wharf demurrage charges, and the action was transferred to District Court. Since the demurrage charges had not been filed with the Federal Maritime Commission ("FMC"), the District Court invoked the doctrine of primary jurisdiction and stayed the proceedings to allow the defendant to obtain a ruling from the FMC on the validity of the charges. The FMC generally held the charges to be valid. Assuming the FMC's primary jurisdiction to have been exclusive, the District Court concluded that it had no jurisdiction to review the FMC decision and entered a judgment against the defendant. The Court of Appeals reversed on the merits. This Court approved the District Court's invocation of the doctrine of primary jurisdiction.

> This is an almost classic case for engaging the doctrine * * *. The Commission was uniquely qualified to consider the dispute in light of the overall

> policies concerning terminal conferences and the conferences' relationship with both carrier-vessels and consignees. The District Court did not err in determining, for purposes of this litigation, that an Article III court, acting on a single, isolated case-and-controversy record in a private suit in which neither the Commission nor the Government was a party, would lack the requisite capacity. [*Id.* at 68-69.]

This Court then held that "the District Court also concluded correctly that it was without authority to review the merits of the Commission's decision." *Id.* at 69. The Court noted that the Administrative Orders Review Act, 28 U.S.C. § 2342 (1964 ed., Supp. V), provided the exclusive method for reviewing final orders of the Maritime Commission. Here, § 1006 of the Federal Aviation Act lodges all appeals from CAB orders in the courts of appeal, which have exclusive jurisdiction to affirm, modify, or set aside the orders.

In light of the cases on exclusive primary jurisdiction, we respectfully submit that the task of this Court is to determine merely whether the Court of Appeals erred in its finding that a continued tort of fraudulent misrepresentation in this case would be inconsistent with the regulatory scheme which treats nondisclosure of overbooking not to be deceptive. The Court of Appeals' decision in this regard was manifestly correct. It has already been shown that to permit oversold passengers, at their whim, to sue and collect punitive damage awards from overbooking airlines would be completely disruptive of the regulatory scheme that contemplates overbooking as an economic necessity and that has found nondisclosure of overbooking to be in the public interest. There is

no practical distinction between the fluctuating standard of duty with respect to overbooking disclosure that would be placed on airlines by the varying judgments of judges and juries throughout the country and the varying standards of court-determined reasonableness of rates found to be impermissible by this Court in the *Abilene Cotton Oil Co.* case.

Petitioner's contention that an airline's "deliberate concealment of * * * [a] material fact * * * is simply beyond the CAB's power to approve" (Brief for Pet. at 47-48) is wrong. It is wrong, first, as conflicting with petitioner's own concession that certain common law remedies must give way to regulatory schemes. It is also wrong in light of the operation of the doctrine of primary jurisdiction as hereinabove described. The courts have frequently held that a regulatory statute may contemplate conduct which would be unlawful but for the regulatory legislation. Thus, in *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 360 (1963), the Court held that the Securities Exchange Act contemplates that the Exchange will "engage in restraints of trade which might be unreasonable absent sanction" by the Act. *Accord, Ricci* v. *Chicago Mercantile Exchange, supra*, 409 U.S. at 303-304 (Commodity Exchange Act). *See also United States Nav. Co.* v. *Cunard S.S. Co., supra*, 284 U.S. at 487 (apparently unlawful shipping agreement "might, upon a full consideration of all the attending circumstances, be approved or allowed to stand with modifications [by the agency]"). The courts have also sanctioned the power of the CAB in exercise of its primary jurisdiction to approve liability disclaimer and exculpatory provisions which would be unlawful or invalid under the common law.

See, e.g., Southwestern Sugar & Molasses Co. v. *River Terminals Corp., supra* (exculpatory provision); *Lichten* v. *Eastern Airlines, Inc.,* 189 F.2d 939 (2d Cir. 1951) (liability disclaimer).

Nader's argument throughout his Brief that the common law savings clause of the Act somehow operates to alter the doctrine of primary jurisdiction is in error. The common law savings clause, which is often found in regulatory schemes, is not an exception to the doctrine of primary jurisdiction. This has been clear since *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co., supra,* which held that a common law savings clause virtually identical to the one invoked by Nader was no bar to the exercise of the doctrine of primary jurisdiction. This Court held that the clause could not preserve a common law right "the continued exercise of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself." 204 U.S. at 446. *Accord, Pennsylvania R.R.* v. *Puritan Coal Co.,* 237 U.S. 121, 129-130 (1915); *Danna* v. *Air France,* 334 F. Supp. 52, 57 (S.D.N.Y. 1971), *aff'd, supra,* 463 F.2d 407 (construing § 1106 of the Federal Aviation Act). Congress, by including the common law savings clause in the Federal Aviation Act that authorized the entire regulatory scheme, clearly did not intend it to operate to permit private plaintiffs to recover damage awards for activities by air carriers—here, the nondisclosure of overbooking—that were found to be necessary and in the public interest by the regulatory agency.

Furthermore, it should be remembered that the Court of Appeals' decision does not leave oversold passengers without a common law remedy against the airlines. The Court of Appeals reinvigorated the traditional common law claim of an oversold passenger, which is a court-made cause of action founded on the antidiscrimination provision of the Act. Pet. App. A16-18. After applying the elements of the "bumping" cause of action to Nader, the Court of Appeals found that Nader had not fully proved the elements of that claim in the trial court, and that portion of the case was remanded. The traditional "bumping" cause of action, pursuant to § 404(b) of the Act that has been characterized as "more generous" than the common law (*Mason* v. *Pan American World Airways, Inc.,* 13 Av. L. Rep. 17,114, 17,117 (D.D.C. 1974) (Gesell, J.)), is not inconsistent with the regulatory scheme because it allows recovery only against airlines that deviate from their own boarding priority rules (which are required to be filed with the Board by 14 C.F.R. § 250.3) in determining which passengers are oversold. In other words, a passenger has no cause of action under § 404(b) if he becomes an oversale as a result of properly applied boarding priority rules on file with the CAB. But if airlines deviate from CAB-filed practices and an oversale results, the airlines may be liable for compensatory and punitive damages. Nothing in the Court of Appeals' decision changes this law.

Lastly, Nader contends that even though the doctrine of primary jurisdiction might extinguish some common law claims that are inconsistent with regulatory schemes, the doctrine cannot operate retroactively. Nader cites no authority for his anti-retroactivity argument other than instances in which the doctrine has operated prospectively rather than retroactively. Brief for Pet. at 48. The two-fold answer to Nader's argument on retroactivity is that a CAB

ruling that Allegheny's overbooking practices are not deceptive will not be a retroactive ruling and that, even if the ruling could be construed to be retroactive, the doctrine of primary jurisdiction permits such retroactive rulings.

The CAB has been wrestling with the overbooking problem for years, as we have shown. We think it is clear that it has both approved overbooking and determined that passenger-by-passenger disclosure would be highly prejudicial to the public. If the CAB agrees in its forthcoming proceedings, it will not be declaring these policies for the first time—and thus validating *future* overbooking and nondisclosure—but rather it will be reasserting that which it has said for many years. It will, in effect, be making clear that Allegheny's practices have been valid in the past and that the common law remedy has to that extent been displaced.

Even if, however, an eventual Board ruling could be construed as retroactive, there is nothing in the doctrine of primary jurisdiction that prohibits such retroactive rulings, and they have occurred frequently. Considering the rationale of the doctrine of primary jurisdiction, this must be so. The factors of uniformity of regulation and agency expertise come as much into play when the agency has not yet ruled as when it has already ruled. In looking at the question in the manner posed by Nader, what difference is there between a person prevented from recovering on a claim because, as Nader argues here, the reference to the agency will result in a ruling sanctioning the allegedly tortious practices, and a person prevented from recovering on a claim because the agency has already made such a ruling? In both cases a common

law claim has given way to a regulatory scheme, as Nader concedes can occur. Why the operation of the doctrine of primary jurisdiction can operate "prospectively" but not "retroactively" Nader has not even attempted to explain or find authority to support.

The courts have made no distinction between retroactivity and prospectivity in their application of the doctrine of primary jurisdiction. A complicated question of whether car-mileage allowances from railroads should be paid over to the lessor of the cars or to the lessee, when the filed tariff contained no provisions answering the question, was held to lie within the primary jurisdiction of the ICC in *General American Tank Car Corp.* v. *El Dorado Terminal Co., supra.* Any doubt that the Court there recognized the agency's primary jurisdiction to determine the reasonableness of a past practice was effectively removed by this Court's subsequent decision upon appeal of the ICC's determination in the same matter. In *El Dorado Oil Works* v. *United States,* 328 U.S. 12, 17 (1946), this Court noted that by its previous decision it had "accepted [the] contention that determination of the validity of the challenged past practices was for the Commission."

> The question before us when this case was first here did not relate to future but to past allowances. Relying on past decisions, we held that the "reasonableness and legality" of the past dealings here involved were matters which Congress had entrusted to the Commission. [*Id.* at 19.]

Similarly, in *Far East Conf.* v. *United States, supra,* 342 U.S. 570, the question was the lawfulness under the antitrust laws of a system of dual freight rates

which had not themselves been filed with the Federal Maritime Commission ("FMC"). This Court showed no hesitation in holding that resort must first be made to the FMC which had primary jurisdiction of the issue of the rates' lawfulness under the Shipping Act, although its determination could effectively be retroactive. *See also United States Nav. Co.* v. *Cunard S.S. Co., supra*, 284 U.S. at 486-487. Mr. Justice Brennan later interpreted these two cases as invoking the doctrine "when 'there is a possibility that a *subsequent* administrative decision would approve the questioned activities * * *.' " *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296, 332 (1963) (Brennan, J., dissenting) (emphasis added), quoting Schwartz, "Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility," 67 Harv. L. Rev. 436, 464 (1954). The primary jurisdiction doctrine was also applied by this Court retroactively in *Port of Boston Marine Terminal Ass'n* v. *Rederiaktiebolaget Transatlantic,* discussed *supra. Accord, S.S.W., Inc.* v. *Air Transport Ass'n of America, supra.*

CONCLUSION

For each of these reasons, we respectfully submit that the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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